Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Consumer Information and Disclosure	)	CG Docket No. 09-158
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
IP-Enabled Services	)	WC Docket No. 04-36

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
IN RESPONSE TO NOTICE OF INQUIRY

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In accordance with the Commission's August 28, 2009 Notice of Inquiry ("*NOI*") in these proceedings, the National Association of State Utility Consumer Advocates ("NASUCA") hereby submits its reply comments in these proceedings.

At the outset, however, NASUCA wishes to note that the Commission's gathering of information in response to the *NOI* could have benefited from providing more time than the fifteen days allowed for parties to review comments and prepare replies.[1] NASUCA understands the Commission's expressed reluctance to grant extensions of comment deadlines but urges the Commission to consider allowing greater time for the preparation of comments, particularly in reply, in future inquiries or rulemakings, especially of this scope. This would go far in obviating the pressure to seek extensions and also will improve the Commission's information-gathering efforts. NASUCA's concerns in these proceedings are ameliorated somewhat by the fact that the *NOI* represents simply an initial foray into establishing and extending greater consumer

[1] Therefore, these reply comments focus only on a few of the initial comments.

protections to consumers of various communications services, and also by NASUCA's ability to provide additional information through *ex parte* presentations. NASUCA also hopes that the Commission will adopt our recommendation that it utilize the Consumer Advisory Committee ("CAC") to assist it in gathering data and view points before moving on to any future rulemaking.

I. GENERAL COMMENTS

A. ON A POSITIVE NOTE, NONE OF THE PARTIES SUBMITTING COMMENTS PRESS THE COMMISSION EITHER TO PREEMPT STATE INDUSTRY-SPECIFIC CONSUMER PROTECTION LAWS OR TO ELIMINATE ANY OF THE COMMISSION'S EXISTING TRUTH-IN-BILLING AND SIMILAR RULES.

While there is much in industry's comments that NASUCA disagrees with, as discussed further below, it is worth noting at the outset that there are some areas upon which all parties submitting comments appear to agree that NASUCA considers positive signs for consumers.

First, none of the major industry parties submitting comments – in particular members of the communications industry – suggest that the Commission should pursue its (as Commissioner Copps eloquently put it) "curious flirtation – with federal preemption"[2] of state consumer protection laws specific to the communications industry. As NASUCA noted in its initial comments, that "flirtation" (and it was considerably more serious than that) marked the Commission's decision-making under the leadership of Chairman Powell and Chairman Martin, and NASUCA devoted some space in its initial comments to urging the Commission to reverse that flawed approach in these prior administrations' decision-making. Happily, it appears that even the industry members

[2] *Truth-in-Billing and Billing Format*, Second Order, Declaratory Ruling and Second Further Notice of Proposed Rulemaking, CG Docket No. 04-208 and CC Docket No. 98-170, 20 F.C.C.R. 6448, 6498 (March 31, 2005) ("*Second Truth-in-Billing Order*") (Separate Statement of Commissioner Michael J. Copps, Approving in Part, Dissenting in Part).

that pursued preemption most vociferously during those years may have dropped preemption as a goal of their efforts before the Commission.

Second, none of those parties submitting comments suggested that the Commission ought to eliminate any of the truth-in-billing or similar consumer protection rules that it has adopted. Indeed, most of the industry commenters appear to take it for granted that the current truth-in-billing and other disclosure-related rules previously adopted by the Commission to protect consumers should remain in effect. Instead, members of the communications industry devote their energies to arguing against expanding those rules or extending them to other sectors of the communications market. While NASUCA obviously disagrees with this aspect of the communications industry's comments, it agrees that the current rules should not be eliminated or weakened in connection with these proceedings. Like the abandonment of industry's once-cherished goal of preempting any state laws regulating communications providers' billing practices and related disclosures, NASUCA sees industry's acceptance of the Commission's current regulatory regime as a very positive development.

B. PREDICTABLY, INDUSTRY CONTINUES ITS ERRONEOUS CLAIM THAT ADDITIONAL REGULATION IS UNWARRANTED BECAUSE THE MARKET WILL TAKE CARE OF CONSUMERS' PROBLEMS.

Predictably, members of the communications industry continue to claim that additional regulation is unwarranted because, they argue, market forces will adequately protect consumers. This claim is wrong on so many levels that it would consume the time and space available to NASUCA in these comments to fully respond. However, several fundamental flaws in industry's claims can be addressed in fairly short order.

1. Government, Not Industry, Has Led Efforts To Improve Provider Billing Practices And Service-Related Disclosures.

A number of industry representatives suggest that it is industry, not government, that have led the way in improving disclosures to consumers regarding charges and services for which the consumer is billed, as well as disclosures regarding other terms and conditions of providers' service. This innovation, the Commission is told, is due to pressures imposed by consumer demands in a competitive marketplace. For example, with regard to the purported constraints imposed on wireless providers by the competitive marketplace, the Cellular Telecommunications Industry Association ("CTIA") asserts:

> In this competitive environment, carriers' billing and other consumer practices must be responsive to consumers' immediate needs. Just as competition has spurred greater network reliability, coverage, and capacity, so too has competition made carriers' ability to address customer service matters a paramount focus of industry leaders large and small. Because of this inherent market competition and the long-track record the mobile wireless industry has in ensuring that consumers are well-informed of their options at all stages of the carrier-customer relationship, expansion of federal regulation of carriers' billing practices is not necessary. To do so needlessly would disrupt the equilibrium that exists at present which has led to record high customer satisfaction levels as well as freeze in time the ability of wireless providers to innovate in service provision.[3]

CTIA – like the other industry commenters – completely ignores the fact that much of the innovation, etc. it cites as responding to consumers' needs were driven not by the market but rather by government intervention – by the Commission, by state regulators and by state or federal courts. In fact, had the government not intervened, it is difficult to imagine wireless customers realizing any of the limited improvements that have been achieved with regard to their service and billing.

A few historical examples of the wireless industry's "responsiveness" to

[3] CTIA Comments, p. 2.

customers' demands ought to suffice to explode CTIA's myth of consumer protections won by the "invisible hand" of the market.

Consider, for example, wireless number portability. Although consumers clearly wanted the ability to carry their mobile phone numbers with them when they changed carriers – a "competitive pressure" on wireless carriers to "innovate" to meet customers' desires – the wireless industry vigorously (and successfully) resisted implementing wireless number portability for nearly a decade after the Commission first indicated portability would be required in 1996.[4] The wireless industry conducted both a frontal assault on the Commission's decision, challenging its validity in the courts, and at the same time fought rearguard actions to delay number portability's implementation.[5]

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[4] *See Telephone Number Portability,* First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, FCC 96-286 (July 2, 1996).

[5] In July 1996, the Commission determined that wireless carriers should be required to provide their customers with number portability by June 30, 1999. *See Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 F.C.C.R. 8352 (July 2, 1996). Twenty-two wireless carriers thereupon sought, and were denied, reconsideration of the Commission's decision to require implementation of number portability by June 30, 1999. *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, 12 F.C.C.R. 7236 (March 11, 1997). Thereafter, Verizon's wireless affiliate sought review of the Commission's decision in the D.C. Circuit, which was subsequently transferred to the 10th Circuit. *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir., filed May 30, 1997). Shortly thereafter, CTIA filed a petition with the Commission seeking temporary forbearance from the June 30, 1999, portability implementation deadline. The Commission granted CTIA's petition and extended the wireless portability implementation deadline to November 24, 2002. *Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability*, Memorandum Opinion and Order, CC Docket No. 95-116, 14 F.C.C.R 3092 (Feb. 9, 1999). In light of the Commission's extension of the portability deadline, Verizon withdrew its pending appeal in the 10th Circuit but subsequently filed a petition with the Commission seeking permanent forbearance of the wireless number portability deadline. The Commission denied Verizon's forbearance petition but extended the deadline to implement number portability yet again – this time to November 24, 2003. *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation And Telephone Number* Portability, Memorandum Opinion and Order, CC Docket No. 95-116, 17 F.C.C.R 14972 (July 26, 2002). Its forbearance petition denied, Verizon then appealed the Commission's number portability rules to the D.C. Circuit, ultimately losing that appeal on June 26, 2003 – nearly a year after the denial of its petition for forbearance. *See CTIA v. FCC*, 330 F.3d 502 (D.C. Cir. 2003). While Verizon's appeal was pending, yet another petition seeking yet another extension of the wireless number portability deadline was filed by yet another wireless carrier, which was finally denied by the Commission – on the very day number portability was required to be implemented. *Number Resource Optimization, et al.*, Order, CC Docket Nos. 99-200 &

Meanwhile, in hypocritical fashion, wireless carriers began imposing line item surcharges on customers ostensibly to recover their costs to implement the number portability they had successfully delayed.

Not only did wireless carriers soak customers for the number portability that they had denied their customers, but the revenues generated by the surcharges many carriers imposed probably vastly exceeded any direct costs of implementing number portability. Since the Commission never audited carriers' number portability implementation costs, there is no way of knowing how much those revenues exceeded carriers' implementation costs but the evidence strongly suggests that the mismatch was extreme. Wireless carriers apparently began imposing regulatory line item charges (i.e., fees) to recover their costs of complying with various federal regulatory programs, including wireless number portability in January 2002 (ten months before portability's implementation deadline, which was later extended another twelve months).[6] According to one industry watchdog, wireless carriers had recovered approximately $629 million from number portability charges before number portability's first day and many had already recovered all their implementation costs by that time or shortly thereafter. For example, Nextel was estimated to have recovered $283 million through its "Federal Programs Cost Recovery Fee" by October 2003, almost triple the $100 million price tag for portability

95-116, 18 F.C.C.R. 24692 (Nov. 24, 2003) (the Commission did, however, grant the wireless industry a 60-day non-enforcement period, however). After nearly seven-and-a-half years of legal maneuvering, the wireless industry finally began porting wireless consumers numbers.

[6] *See* Morgan Jindrich, "Prepaid Profit Plan for Wireless Companies," Center for Public Integrity, p. 2 (Oct. 2003), available at http://projects.publicintegrity.org/telecom/report.aspx?aid=67. Nextel reportedly was the first wireless carrier to begin charging such a fee. Nextel's fee was initially $0.55 per month but was tripled nine months later – to $1.55 per month. *Id*. Interestingly, it was only *after* the Commission extended the number portability deadline for wireless carriers to November 24, 2003, that Nextel tripled its number portability surcharge.

calculated by the company.[7] Similarly, if just $1 of AT&T Wireless' $1.75 monthly surcharge went to number portability implementation costs, it would have collected about $84 million per year and pay off its estimated implementation costs in less than two years.[8]

Likewise, when Verizon Wireless reported on October 20, 2003 that it anticipated charging customers $0.10 to $0.15 per month to recover its estimated $60 million implementation cost estimate, CPI calculated that the carrier's surcharge would generate $39 to $58 million annually thereby allowing it to recover its implementation costs in as little as one year.[9] However, Verizon Wireless ended up announcing on March 1, 2004 that it was adding $0.40 to its monthly surcharge to recover number portability implementation costs, which should have allowed it to recover its number portability implementation costs in approximately five months. The Verizon Wireless experience is worth noting because, unlike other members of its industry, Verizon Wireless actually reduced its surcharge within a relatively short time (by November 2004) – while NASUCA's petition for a declaratory ruling regarding carriers' "regulatory" line item surcharges in the Commission's truth-in-billing docket was pending. Interestingly, however, five months after the Commission denied NASUCA's petition Verizon Wireless announced in bill inserts to its customers that it was introducing a new $0.40 monthly "Administrative Charge" effective October 1, 2005 – thus conveniently finding another means of charging customers *exactly the same amount* as the prior number

[7] Jindrich at 2.

[8] *Id*. at 5.

[9] *Id.*

portability charge.[10]

No doubt the wireless industry will claim the foregoing is "old history." It is anything but. NASUCA notes the California Public Utility Commission's ("CPUC") comments make it clear that at least one wireless carrier, T-Mobile, is apparently still recovering its wireless number portability costs via a line item surcharge nearly six years after portability's start date.[11]

If, however, industry wants more recent examples that destroy its hyperbolic claim that "industry leads, government lags" when it comes to giving consumers the information and protections they need and want, there are plenty available. The wireless

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[10] *See* Louis Hau, "Latest Utility Trend: Billing customers for their bills," St. Petersburg Times (Aug. 23, 2005), available at http://www.sptimes.com/2005/08/23/Business/Latest_utility_trend_.shtml.; Michael Finney, "Cost of Verizon Wireless Goes Up: Company tacks on Administrative Charge," KGO-TV/DT (Dec. 1, 2005), available at http://abclocal.go.com/kgo/story?section=7on_your_side&id=3686998.

While NASUCA does not have a copy of the Verizon Wireless bill insert sent to its customers, the insert apparently advised customers:

> Notice of Introduction of Administrative Charge
>
> Verizon Wireless will begin assessing an "Administrative Charge" of $0.40 per line per month on October 1, 2005. This charge will help defray certain costs we incur, currently including: (i) fees and assessments on network facilities and services, (ii) charges we, or our agents, pay local telephone companies for delivering calls from our customers to their customers, and (iii) certain costs and charges associated with proceedings related to new cell site construction. The sum of Verizon Wireless'Regulatory Charge ($0.05 per line per month) and Administrative Charge will still be the lowest of such charges among national wireless carriers.
>
> The Administrative Charge, and what's included, is subject to change from time to time, and we will notify you if the charge increases. Please note that this is a Verizon Wireless Charge, not a tax that we are required to collect from you. For more information about this charge, visit www.verizonwireless.com or call 1-888-684-1888. Please consult your Customer Agreement for information about rate changes.

See http://www.sprintusers.com/forum/archive/index.php/t-75763.html.

[11] *See* CPUC Comments, Appendix (T-Mobile advises that its "Regulatory Programs Fee," which is anywhere from $0.86 - $1.21/line/month helps it "recover the costs associated with funding and complying with a variety of government mandates, programs, and obligations, such as enhanced 911 programs, number portability, and governmental requirements concerning the construction and operation of our network.").

industry's movement toward prorating early termination fees ("ETFs") is a prime example for the Commission to consider.

There is no question ETFs were quite popular with wireless carriers. Within a short time, virtually every wireless carrier had adopted large, flat-rated ETFs.[12] There is likewise no question that ETFs were wildly unpopular with customers, government regulators and many lawmakers.[13] Yet carriers refused to take any action to reduce or ameliorate the hateful aspects of such penalties until 2008 and then, it appears, primarily as a *quid pro quo* to secure a Commission ruling that states were preempted from regulating such fees – an effort that has been unsuccessful thus far.[14] Carriers' changes in ETF practices had less to do with responding to market pressures than with attempting to defuse the threat of government intervention to eliminate or modify ETFs, a threat that was becoming increasingly real at that time.

Likewise, CTIA and other wireless carriers wrongly tout the changes in billing format that they have made in recent years as another example of the industry responding to consumers' demands.[15] In fact, the carriers' actions are driven by the threat of

[12] Perhaps the speed with which wireless carriers adopted ETFs industry-wide is the market "innovation," "creativity" and "responsiveness" to which CTIA and other wireless carriers refer in their comments. *See* CTIA Comments at 2; Verizon Comments at 54-55.

For an alternative perspective on the wireless industry's "innovativeness" and "customer-driven business decisions," *see* "AT&T Presents Their Version Of Wireless History," DSL Reports (Sept. 17, 2008), available at http://www.dslreports.com/shownews/ATT-Presents-Their-Version-Of-Wireless-History-97807.

[13] Even CTIA simply notes that "ETFs proved to be a great source of concern in the market." CTIA Comments at 12. This is, to say the least, an understatement.

[14] Interestingly, CTIA's Table 1, which purports to show the timeline of plan and pricing innovation in the wireless industry, gets the time frame for wireless carriers' introduction of prorated ETFs (and contract extension flexibility) wrong by at least two years – even by CTIA's own reckoning. *Compare* CTIA Comments, p. 7, Table 1 *with id*. at 12-13 (ETFs) & 14 (contract extensions).

[15] *See, e.g.*, CTIA Comments at 26-27; Verizon Comments at 55.

government intervention to require greater clarity and ease of comprehension regarding the plethora of charges, surcharges, fees, taxes, assessments, etc. that appear on customers' monthly bills. That intervention began, at least at the federal level, with the Commission's truth-in-billing rules adopted in 1999 (though many states adopted similar laws or regulations governing carriers' billing practices and descriptions long before the Commission's truth-in-billing rules' adoption). The heat was turned up on the wireless industry in 2004, first with NASUCA's March 2004 petition for declaratory ruling on "regulatory" line item charges and then with the negotiation with 33 states' attorneys general of Assurances of Voluntary Compliance ("AVC") to settle investigations into billing and similar practices employed by the three largest wireless carriers.[16] Government intervened again, with the Commission's 2005 decision to extend to the

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[16] Verizon's discussion of the AVCs in its comments is almost comical in the "spin" it attempts to put on the states' coercive efforts to secure changes in wireless carriers' billing and related practices and disclosures. Verizon claims that the AVCs were the product of "a cooperative effort with 33 state attorneys general . . . that, as a practical matter, established national uniform consumer protection standards relating to advertising and the provision of information to consumers at the point of sale, including information regarding the minutes in the plan, any early termination fee, and the fact that certain taxes or monthly discretionary charges may be added." Verizon Comments, p. 4. The AVCs hardly represented a "cooperative" effort; rather they were settlements entered into to terminate the states' law enforcement investigations into whether the wireless carriers' practices violated various state deceptive trade practice laws. One does not typically pay $1.67 million for, among other things, attorneys' fees or costs of investigation incurred by a state's attorney general as part of a "cooperative effort," nor does one include a disclaimer of any admission of liability in a "cooperative" agreement.

The carriers themselves acknowledged the true character of the AVCs by inserting the following clause in each agreement:

> *Carrier is entering into this Assurance solely for the purposes of settlement*. *Nothing contained in this Assurance may be taken as or construed to be an admission by Carrier or as evidence supporting any of the allegations raised by the Attorneys General*, any matter of fact or law, *any violation of state or federal law, or any other liability or wrongdoing whatsoever*, including without limitation an admission by Carrier that any of its business practices are or have been unfair or deceptive, or violate or have violated any of the Consumer Statutes of any of the Participating States, all of which Carrier expressly denies.

See Sprint AVC, ¶42 (emphasis added); *see also* Verizon AVC, ¶42 and Cingular AVC, ¶42 (all three AVCs are available at http://www.nasuca.org/AVC%20Documents.htm).

wireless industry its truth-in-billing rule requiring bills to be clear, concise and non-misleading, and the Commission's notice of further proposed rulemaking in that same order which proposed additional regulation of carriers' billing practices and service-related disclosures.

It is therefore no coincidence that changes in billing format and descriptions cited by some members of the wireless industry were implemented in 2005.[17] This was a period of heightened government scrutiny of carriers' billing practices and related customer disclosures and also coincided with the Commission's extension of some of its truth-in-billing rules regarding billing disclosures to the wireless industry.

The foregoing puts the lie to CTIA's assertion that:

> [r]ather than statically waiting for costly and time-consuming governmental intervention, wireless service providers have dynamically met the challenges that have arisen with technological developments, understanding and catering to the needs of their valued customers in the process.[18]

Industry has consistently lagged in responding to customers' complaints and demand and has generally acted, grudgingly, when government intervenes or seriously threatens to intervene to address egregious consumer abuses. Moreover, to the extent government intervention has been "costly" or "time-consuming," that is due almost entirely to industry's dogged opposition to government's efforts. A good example of the costly, delaying nature of industry's opposition to government intervention is provided by Cingular's unsuccessful efforts to claim state laws prohibiting certain line item charges

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[17] *See* Verizon Comments at 40.

[18] CTIA Comments at 10-11.

were preempted in accordance with the Commission's 2005 declaratory ruling – despite the fact that the Commission's declaration was earlier vacated by the Eleventh Circuit.[19]

2. The Market Has Not Adequately Protected Consumers in the Past and Will Not Adequately Protect Consumers in the Future.

Industry's assertion that market forces are adequate to protect consumers in the future[20] ignores the fact that the market has not adequately protected consumers in the past. The market clearly did not provide adequate protection for consumers with respect to "slamming" and "cramming" practices of carriers, and may have actually encouraged carriers to engage in such abusive, anti-consumer practices. The Commission previously has noted as much.

For one thing, the Commission rejected carriers' "market forces" arguments when it adopted truth-in-billing rules in the *First Truth-in-Billing Order*. In rejecting such arguments, the Commission noted:

> We recognize that, at this time, *competitive pressures alone do not ensure that consumers receive clear, informative and consumer-friendly telephone bills from certain carriers*. . . . *Even in competitive markets, however, disclosure rules are needed to protect consumers*. Indeed, our adoption of these truth-in-billing principles is in large part designed to bring to consumers some of the protections to which they would be entitled if these services were billed in the same manner as other credit purchases. For example, the Truth in Lending Act (TILA) and implementing rules require credit card issuers to provide information concerning the amount and date of each transaction appearing on a bill, the seller's name, and the location where the transaction took place. These requirements are intended to "protect the consumer against inaccurate and unfair billing and credit card practices." In a similar manner, our principles and guidelines will protect consumers from misleading and

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[19] *See Peck v. Cingular Wireless, LLC*, 535 F,3d 1053 (9th Cir. 2008); *Riensche v. Cingular Wireless, LLC*, 320 Fed. Appx. 646 (9th Cir. 2009).

[20] *See, e.g.*, CTIA Comments at 2; Verizon Comments at 48-49; Qwest Comments, pp. 2-3.

inaccurate billing practices.[21]

Nor has the Commission retreated from the notion that competitive forces alone are inadequate to protect consumers from unreasonable, misleading, deceptive or otherwise abusive practices of carriers or other providers of telecommunications services because, on numerous occasions, it has adopted more stringent consumer protection regulations despite market forces.[22]

Moreover, the Commission recognizes that the competitive marketplace for communications services, such as it is, likely encourages providers to engage in such

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[21] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-170, 14 F.C.C.R. 7492, 7497-98 ¶¶6-7 (May 14, 1999) (emphasis added) ("*First Truth-in-Billing Order*"); *see also id*. at 7497 n. 17 ("Because mature markets also require disclosure rules, we disagree with ALTS' argument that any confusion over billing formats that exists today is merely the result of the transition to fully competitive telecommunications markets."); *id*. n. 18 ("We note that, to some degree, it is significantly *easier* to bill fraudulent charges on telephone bills than on credit card bills.").

It is worth noting that, in the *First Truth-in-Billing Order*, the Commission also poured cold water on the notion that voluntary industry guidelines would suffice to adequately protect consumers from unreasonable or misleading carrier practices. On this point, the Commission wrote:

> [W]e disagree with commenters who suggest that purely voluntary guidelines would be sufficient to combat misleading bills that facilitate slamming and cramming. The extent of the current problem shows that voluntary action alone is inadequate for many carriers. Failure to codify these principles and implementing guidelines might result in carriers ignoring our requirements, to the detriment of consumers.

14 F.C.C.R. at 7499-7500 ¶11.

[22] For example, in rejecting wireless carriers' arguments that they should be exempt from the truth-in-billing rule requiring billing descriptions to be "brief, clear, non-misleading and in plain language" because they operate in a competitive marketplace, the Commission wrote:

> We disagree with those commenters that argue that CMRS providers should be exempted from this requirement because they operate in a competitive marketplace. The Commission specifically rejected this argument in the [*First Truth-in-Billing Order*] noting that, as competition evolves, the provision of clear and truthful bills is paramount to efficient operation of the marketplace. Although we agree that a robustly competitive marketplace provides the best incentive for carriers to meet the needs of their customers and affords dissatisfied customers with an opportunity to change carriers, we also recognize that some providers in a competitive market may engage in misconduct in ways that are not easily rectified through voluntary actions by the industry.

See Second Truth-in-Billing Order, 20 F.C.C.R. at 6456-57 ¶17.

abusive and fraudulent practices as slamming and cramming. Just last year, the Commission referred to this problem, observing yet again:

> This practice, known as "slamming," distorts the telecommunications market by enabling companies that engage in fraudulent activity to increase their customer and revenue bases at the expense of consumers and law-abiding companies.[23]

Government intervention – by states and the Commission – is therefore necessary to curtail and eliminate cramming and slamming practices by traditional and non-traditional telephone carriers. These practices continue today due to the absence of adequate statutory and regulatory prohibitions or the absence of adequate enforcement, at both state and federal levels.

Moreover, as the Utility Consumer Action Network ("UCAN") makes clear in its comments, cramming is on the increase in other communications-related markets that are currently unregulated, or at most lightly regulated, by federal or state governments. In its initial comments, UCAN – like NASUCA – identifies a number of areas where cramming is rampant and growing worse:

> One category of cramming is Third-party Data/Services cramming which are unauthorized data and service charges by companies other than a consumer's designated provider. The charges relate to items such as unauthorized text messages, ring-tone subscriptions, multimedia services, unlisted charges by billing aggregators, and others. . . . A second category is carrier data service cramming, which is similar to third-party cramming, except the unauthorized charges are added to bills by the service provider. A third category of cramming is international roaming where travelers have phones programmed to auto-check for email and services if turned on when consumers are unaware that the service is running without required action on their part. A fourth category [of cramming activity] includes charges for calls not placed, which may be the result of billing error, a form of hacking or fraud, or otherwise. Here the consumer denies placing

[23] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, Fourth Report and Order, CC Docket No. 94-129, 23 F.C.C.R. 493, 493-94 ¶2 (Jan. 9, 2008). .

> the calls, has no history or knowledge of anyone at the numbers or locations dialed, but was never lost possession of their phone.[24]

In short, the marketplace provides both incentives and disincentives to engage in unreasonable billing and other business practices. As NASUCA noted in its initial comments, economists recognize the profit-maximizing opportunities provided by complex service offerings and billing practices. Moreover, the realities of today's market for communications services, with the growing use of bundles of traditional and non-traditional services, and regulated and unregulated services, increases those opportunities several fold. This reality is reflected in the tracking of third-party billing complaints the California Public Utilities Commission's ("CPUC") has undertaken since November 2008. The data compiled by the CPUC indicates that the bulk of cramming complaints it receives (more than 77 percent) originate from third-party billing practices, with slightly more than half (54 percent) originating with regulated service providers.[25] To put it another way, of the nearly 4000 cramming complaints received by the CPUC in the past eleven months,[26] nearly 23 percent (or roughly 900) involved allegedly unauthorized

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[24] UCAN Comments, pp. 8-9. UCAN is an associate member of NASUCA and often files separate comments.

[25] *See* CPUC Comments, p. 4, Tables 1 & 2.

[26] The CPUC's data is revealing for yet another reason. The sheer number of cramming complaints received by the CPUC in less than one year exceeded the volume of complaints received by the Commission during all of 2008 (3,295 according to the CGB's quarterly reports). The CPUC's data demonstrates that the number of consumers experiencing confusion, fraud, or other abusive billing practices is considerably larger than the universe of complaints lodged with the Commission. The data collected by just one, albeit large, state paints a starkly different picture than the pleasant fantasy of "extremely satisfied customers" enjoying the fruits of carriers' "innovative" service offerings and billing formats.

Similarly, the CPUC's data regarding the twelve formal enforcement actions it has taken under California law – the $73 million in monetary penalties imposed (fines and restitution) and the number of customers affected by the industry practices that prompted the enforcement actions (529,000 customers or more) – eloquently define the scope of the problems consumers face and the inadequacy of the market, alone, to cure those problems. *See* CPUC Comments, Appendix.

charges that originated with traditionally-regulated carriers. Nearly 3000 complaints involved charges included on regulated providers' bills that originated with some third party, and of these complaints, a little over half (over 1,600) involved services subject to the CPUC's jurisdiction. The other 1,300 third-party cramming complaints involved services not regulated by the CPUC and where the CPUC's authority may be limited – other than by limiting the ability of regulated companies to place the charges on their customers' bills.

The Citizens Utility Board's ("CUB") comments paint a similar picture regarding the difficulty the average consumer experiences in understanding his or her bill and making rational choices among services and providers. According to CUB:

> [D]ata gleaned from CUB's Phone Savings Center, as well as our online tools, [indicates that] the average Illinois consumer is overpaying on local, long distance and wireless bills by more than $500 a year. The only explanation for such waste is that consumers lack clear, concise and readily available information to help them be smart shoppers of telecommunications service.[27]

Consumers generally do not throw their money away on products or services they do not need or want. CUB's comments regarding the average overpayment by Illinois consumers is a clear sign of market failure, and a clear sign that market forces do not adequately protect consumers.

C. EQUALLY PREDICTABLE ARE INDUSTRY'S INFLATED CLAIMS ABOUT CUSTOMER SATISFACTION WITH THEIR SERVICE AND DISREGARD FOR EVIDENCE CUSTOMERS CONTINUE TO EXPERIENCE SUBSTANTIAL PROBLEMS WITH BILLING AND RELATED PRACTICES.

Equally as predictable as industry's claims that market forces alone can adequately protect consumers, are industry's inflated claims about customer satisfaction

[27] CUB Comments at 1 (footnote omitted); *see also id*. at 2 for more details. CUB is a NASUCA member.

with their service. These claims show an utter disregard for the body of evidence demonstrating that customers continue to experience substantial problems with billing and related practices. Despite the extensive discussion of the high level of consumer complaints in both the *NOI*[28] and in regulators' and consumer advocates' comments,[29] industry participants in these proceedings are in deep denial.

1. Industry's Attempt to Downplay The Commission's Complaint Data Is Flawed

Several wireless industry commenters, for example, read the consumer complaint data cited by the Commission in support of the *NOI*'s issuance, as actually undermining the Commission's conclusion – and assertions of groups like NASUCA – that the Commission's quarterly complaint data reveals high levels of dissatisfaction among wireless consumers. For example, CTIA claims that wireless complaints lodged with the Commission's Consumer and Government Affairs Bureau ("CGB") in the first quarter of 2009 ("1Q2009") were generally down from the number of complaints received in 1Q2008.[30] Moreover, CTIA claims, the number of complaints lodged with the CGB are miniscule when considered on a per customer basis.[31]

Suffice it to say, there are a number of flaws in the wireless industry's arguments regarding Commission quarterly complaint statistics. For one thing, comparing one quarter to another year's quarter produces virtually meaningless comparisons – a review of the CGB's quarterly complaint reports makes it clear that complaint number vary considerably from quarter to quarter, and even from year to year. To some extent, these

[28] *NOI* ¶15 & nn. 37 & 39.

[29] *See, e.g.*, NASUCA Comments, pp. 4-9; CPUC Comments, p. 4, Tables 1 & 2, and p. 6.

[30] CTIA Comments, pp. 17-19 & Table 4.

[31] *Id.* at 17-18. Verizon makes much the same argument in its comments. *See* Verizon Comments, pp. 6-8

fluctuations reflect changes in the marketplace that reflect something other than heightened consumer satisfaction. For example, wireless carriers' recent introduction – and marketing rollout – of prorated ETFs might reasonably be expected to drive down consumer complaints, at least initially. However, as consumers gain more familiarity with how these prorated ETFs work (or more accurately, are applied by carriers), one might well expect to see complaints involving ETFs creep back up. Similarly, changes in the market – such as those that occur when major mergers or acquisitions take place or when a new service obligation (such as number portability) is required – often produce swings in the number or types of complaint received by the CGB.[32]

A more reliable view is to look at complaint trends over several years. It cannot be denied that complaints involving the issues at the NOI's heart (billing and rates, ETFs, contract formation, marketing and advertising) have consistently been in the top five categories of Commission complaints for as long as the Commission has kept records of such complaints. These complaints number in the tens of thousands each year and have been at such high levels throughout this period.

Moreover, the carriers' attempt to derive a per-capita rate of complaints across the entire pool of consumers is not terribly compelling. For one thing, the industry (and Commission) subscribership numbers for wireless service is based on the number of handsets in use – not the actual number of customer accounts. Many households in the United States have multiple handsets – often one or more for each adult, youth or child in the home. Yet typically one adult is responsible for the bill and for service-related

[32] For example, number portability complaints received by the CGB in the wake of carriers' implementation of the Commission's requirement made up a significant portion of complaints received by the CGB in 4Q2003 (3,447), steadily declined through 2004 (2,2904 in 1Q2004, decreasing to 256 in the 4Q2004 CGB report), and disappeared thereafter. The CGB's quarterly reports are available at http://www.fcc.gov/cgb/quarter/welcome.html.

decisions. One complaint regarding wireless service may thus involve service to multiple handsets – but this information simply is not (and possibly cannot) be tracked.

Comparing the number of complaints received by the Commission with the number of telephone users, Verizon characterizes the abusive practices as "statistically inconsistent" and "miniscule."[33] Verizon's analysis rests on an unstated premise that every consumer who is adversely affected by an abusive practice complains to the Commission. It also rests on an unstated premise that governmental action plays no role in curtailing and eliminating the abuses. Neither premise is true.

NASUCA's opening comments illustrate how a small number of complaints to government are not necessarily indicative of a problem of narrow scope but can rather be symptomatic of a problem of wide scope.[34] For example, the number of ETF-related complaints submitted to the Commission would likewise be considered "miniscule" under Verizon's analysis. Yet even CTIA admits that wireless carriers' ETFs were "of great concern in the market."[35] Anger and frustration over these fees, and their most offensive aspects (*i.e.*, they remained fixed regardless of the length of service remaining under contract), was sufficient to garner the attention and action of attorneys general in thirty-three states, leading to execution of AVCs in 2004 that settled law enforcement investigations involving the three largest wireless carriers in the country. Likewise, ETFs spawned numerous class action lawsuits around the country, and were the subject of

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[33] Verizon Comments at 6-7.

[34] NASUCA Comments at 50 nn. 95 & 96.

[35] CTIA Comments at 12.

several bills introduced in Congress.[36] Similarly, the controversy over wireless ETFs even garnered enough concern at the Commission to yield a rare, *en banc* hearing of the Commission to consider their justification and effects, and whether and how they should be regulated.[37] The uproar over ETFs cannot be denied, regardless of the purportedly low, per capita rate of complaints lodged with the Commission over time.[38] Ultimately, wireless carriers' took steps to address the worst aspects of their ETFs, not in response to market forces but rather because of governmental action and the prospect of governmental action.

In addition, some industry practices mask the scope of a problem. Verizon, for example, claims to "remove any third-party charge from a customer's bill at the customer's request, no questions asked." Verizon's practice, while assisting those cramming victims who complain to Verizon, has the statistical consequence of leaving a substantial majority of incidents of alleged cramming disclosed to Verizon unreported to government. For this reason, and also because much of the attraction of cramming in first place comes from the fact that many crammed consumers do not notice the charges

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[36] *See, e.g.*, "Cell Phone Consumer Empowerment Act of 2007," S. 2033 (Introduced Sept. 7, 2007), available at http://thomas.loc.gov/cgi-bin/query/C?c110:./temp/~c110fW9vH3; "Communications Opportunity, Promotion, and Enhancement Act of 2006," H.R. 5252, § 632 (Introduced June 12, 2006), available at http://thomas.loc.gov/cgi-bin/query/C?c109:./temp/~c1094JFBDt.

[37] *See* "FCC to Hold Public Hearing and Open Commission Meeting Thursday, June 12, 2008," Commission Meeting Agenda (June 5, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282728A1.pdf.

[38] Slamming offers a similar example of a significant industry-wide problem that compelled Commission and state intervention despite a relatively, by Verizon's accounting, low per capita rate of complaints lodged with the Commission. According to the CGB's quarterly reports, from 2001 to 2004, the Commission received about 23,900 slamming complaints – about 7,800 complaints per year. "The FCC Taking the Profit Out Of Slamming," News Release, p. 1 (Aug. 5, 2004). By industry's reckoning, only a tiny percentage of long distance customers served nationwide actually submitted a slamming complaint – but no one would dispute that slamming was, and still remains, a major problem. In comparison, the total number of billing and rate complaints received by the Commission in 2003 tripled the number of slamming complaints during the same period, even exceeding in one year the total number of slamming complaints received by the Commission from 2001 to 2004 (27,620 compared to 23,900).

at all or may not care to fight them and instead simply pay them, the number of cramming violations reported to government almost certainly vastly understates the number of cramming incidents actually suffered by consumers. For these reasons, Verizon's statistical argument is misleading and fails to supply any credible basis for leaving consumer protection to the market.

Similarly, the United States Telecom Association ("USTelecom") disputes the significance of the FCC complaint data, asserting that the largest category of complaints is those involving the Telecommunications Consumer Protection Act ("TCPA"), which "pertains to issues such as junk faxes and the do-not-call registry that are frequently out of providers' control."[39] It is not clear when such issues **would** be in the providers' control. More importantly, given the diverse and widely-distributed sources of junk faxes and do-not-call violations, the level of such complaints is not surprising. But the higher level of such complaints cannot excuse the continuing high level of complaints against the providers referred to by USTelecom.[40]

Likewise, USTelecom's assertion that "the growth in billing-related complaints is being driven by external factors causing a general increase in complaints filed"[41] is hardly helpful to its cause. This merely suggests that the prior numbers were suppressed, not by the high quality of USTelecom's members' service but rather by consumers' lack of knowledge about where or how to file complaints. As noted by NASUCA in its comments:

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[39] USTelecom Comments at 6.

[40] As UCAN points out, consumers are often abused by practices of authorized agents, who may or may not be seen as part of the "industry." UCAN Comments at 2.

[41] USTelecom Comments at 8.

> [I]t does not appear that the FCC's rules even require carriers or service providers to inform their customers of the existence of the FCC informal complaint process. Thus consumers are left on their own to discover this forum."[42]

By and large, those in the industry assert that "consumers are largely satisfied with their telephone service."[43] They downplay the significance of data on consumer complaints.[44] And they argue that "[i]n the highly competitive communications marketplace, service providers have an economic incentive to provide information to consumers and to offer favorable terms of service."[45]

Regulators and consumer advocates tell a substantially different story, recounting the long and continuing history of abuse by industry members large and small. These comments suggest that the true economic incentive here is for industry participants to seek to minimize the level of regulation applicable to them. This is understandable, but does not advance the public interest. As pointed out in the comments of NASUCA and others, there is an abiding and enduring need for consumer protection and information regulation, in order to prevent the abuses.

It is fair to say that service providers in this, like all other industries, would prefer as little as possible regulation that limits their freedom of action while protecting consumers. But that philosophy is not grounds for "restraint" on the part of regulators, contrary to the arguments of providers like Comcast Corporation ("Comcast").[46]

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[42] NASUCA Comments at 9.

[43] USTelecom Comments at 5.

[44] *Id.* at 5-9.

[45] *Id.* at 2; *see also* Comcast Comments, pp. iii-iv.

[46] *See, e.g.*, Comcast Comments at 20, 23.

2. Third Party Surveys Do Not Provide Much Support For Industry's Argument Either.

Other industry commenters cite various third party surveys and reports that suggest consumer satisfaction with their industry or themselves, specifically, are at record highs. The surveys and reports cited by these commenters do not provide much support for industry's argument that market forces alone are sufficient to protect consumers.

For example, CTIA claims that third party surveys and reports show that wireless customers are "extremely satisfied" with their service and believe that it is "constantly improving."[47] Among the reports cited by CTIA in support of its claim is a 2009 survey conducted by Consumers Reports. Discussing this survey, CTIA claims:

> Consumers Reports found that a clear majority of the nearly 52,000 surveyed said they were "completely or very satisfied with their service," and that this was "a substantial improvement over 2007." The report found that "overall, cell-phone service has become significantly better…contract terms are less onerous, and there [a]re fewer problems with call quality." The stark improvement in wireless customer satisfaction was largely a result of carriers' efforts to increase call quality and reduce connectivity issues, and their decisions to end the policy of extending contracts when subscribers make changes to their plans and pro-rate ETFs.[48]

There are, however, a few clouds to go along with the silver lining CTIA claims to see.

For one thing, the Consumer Reports 2009 survey results are hardly something for the wireless industry to crow about. It is true that the 2009 report concludes that:

> Overall, cell-phone service has become significantly better . . . . Sixty percent of readers were completely or very satisfied with their service. This appears to be a substantial improvement over 2007.[49]

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[47] CTIA Comments at 15.

[48] *Id.* at 15-16.

[49] "Best Cell Phone Service," *Consumers Reports*, p. 28 (Jan. 2009).

This conclusion begins to lose some of its luster when the rest of the 2009 report is considered. For example, the report notes that "the improvement means *cellular satisfaction is now closer to the average* among all services we rate; *it had previously been among the worst*."[50] In other words, the 2009 report proves the old adage, "when you're at rock bottom, there's nowhere to go but up." Moreover, even the improved numbers found in the Consumer Reports 2009 report are worrisome. For example, if sixty percent of readers who took the Consumer Reports survey were completely or very satisfied with their service, forty percent were not – forty percent 270 million wireless subscribers (in 2008)[51] is a fairly large number of Americans. Likewise, the 2009 report found that "42 percent of readers [taking the survey] reported that they had no major complaints about service, up from 29 percent in our previous survey."[52] Put another way, this means 58 percent of survey takers had a major complaint about their wireless service – again, a rather large number of Americans would be represented here.

More significantly, CTIA overlooks the 2009 Consumer Reports conclusion that attributes wireless consumers' increased satisfaction to governmental action and the prospect of governmental action – not carriers' market-driven decisions. On this point, the 2009 report notes:

> Carriers have curbed such practices [*e.g.*, automatically extending service contracts when customers make changes to their service] because of increasing competition *and the threat of consumer rights legislation in Congress. Added pressure came from more than 100 class-action and other lawsuits coast to coast, including one by the Minnesota attorney*

[50] *Id.* (emphasis added).

[51] *See NOI* ¶15 n. 41.

[52] "Best Cell Phone Service," *Consumers Reports* at 30.

general, and several key court rulings favorable to consumers.[53]

The 2009 report's conclusion is consistent with everything NASUCA has said in this proceeding: Industry does not adopt more consumer-friendly practices in response to market pressures driven by consumers' needs or wants; industry adopts more consumer-friendly practices only when government intervenes – or appears likely to intervene.[54]

Moreover, government intervention remains necessary, even when industry seeks to avoid it by suddenly changing its practices, to ensure that industry does not revert to its old ways once the heat is off.

D. INITIAL COMMENTS CONFIRM THE LIMITATIONS OF LAWS OF GENERAL APPLICABILITY IN PROTECTING CONSUMERS OF COMMUNICATIONS SERVICES.

While NASUCA has always recognized the need for and usefulness of state laws of general applicability to protect consumers from some of the most abusive practices in the communications industry, it has always recognized the limitations of such laws in adequately protecting consumers. For one thing, many consumer fraud laws require proof of intentional or willful conduct before any statutory or other remedy is available. This high burden of proof required under such laws makes it extremely difficult for state law enforcement officials to use such laws as an effective law enforcement or consumer protection tool to combat abusive industry practices.

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[53] *Id.* (emphasis added).

[54] CTIA also cites a survey conducted by mywireless.org in support of its claims. CTIA Comments at 16-17 & 25. Citing mywireless.org's results as a "separate study" is laughable given that mywireless.org apparently is a sham grass-roots consumer organization funded and organized by CTIA. *See* Common Cause article regarding mywireless.org (Sept. 8, 2009), available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1498637; *see also* Source Watch article regarding mywireless.org (Sept. 12, 2008), available at http://www.sourcewatch.org/index.php?title=MyWireless.org.

Likewise, laws of general applicability do not adequately protect consumers who are entitled to act as private attorneys general under such laws. For one thing, on an individual consumer basis, the damages associated with unreasonable, deceptive or misleading carrier practices may be so small that only a small claims court would have jurisdiction over the consumer's complaint. As one state's supreme court has noted, "small claims court [is] not an effective remedy, because the amounts at issue are too small to be worth the [consumer's] time and energy, let alone the nominal filing fee."[55] Moreover, many carriers and other communications providers utilize clauses in their service contracts, such as mandatory arbitration clauses and clauses banning class-action lawsuits, to further restrict consumers' legal rights and remedies under laws of general applicability.[56] Finally, laws of general applicability are too blunt a tool with which to stop abusive practices within a particular industry. Indeed, states that have been successful in curbing such abuses as cramming and slamming have in large part done so using laws specifically addressed to these practices rather than under generally applicable unfair trade or deceptive trade practices laws.[57]

Even Verizon apparently recognizes these limitations in its initial comments, writing:

> *As a supplement to such industry guidelines and principles*, there are also existing consumer protection laws such as deceptive trade practices acts, administered by the state Attorneys General and the Federal Trade Commission within their respective areas of authority, to remedy any actual wrongs committed with respect to information disclosure, as well as existing FCC truth-in-billing and disclosure rules.[58]

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[55] *McKee v. AT&T Corp*., 191 P.3d 845, 858 (Wash. 2008).

[56] *See, e.g*., DirecTV Comments, Exhibit A; Sprint Nextel ("Sprint") comments, Exhibit D.

[57] *See* NASUCA Comments at 42-57; *see also* CPUC Comments at 2-3 & Appendix.

[58] Verizon Comments at 5 (emphasis added).

In other words, consumer protection laws of general applicability supplement industry-specific rules and regulations – they do not supplant the need for industry-specific laws.

E. COMMENTS SUBMITTED THUS FAR SUPPORT NASUCA'S SUGGESTION THAT THE COMMISSION SHOULD MAKE GOOD USE OF ITS CONSUMER ADVISORY COMMITTEE GOING FORWARD.

NASUCA strongly agrees with USTelecom that there is a need for consumer education and outreach by the Commission and other stakeholder agencies.[59] But NASUCA strongly disagrees with USTelecom's suggestion that such outreach can or should be a substitute for regulation of the industry. Consumer education is vitally important but cannot be used as an excuse to allow abuse of consumers under the rationale that their choices are educated choices. And education by the government cannot excuse informational and educational failures on the part of the industry itself.

In its initial comments, NASUCA urged the Commission to make good use of its existing resources in addressing the matters raised in the NOI, in particular the Consumer Advisory Committee ("CAC").[60] Not only can the CAC assist the Commission in reviewing the parties' comments and other materials related to communications providers' billing and service disclosure-related practices, and recommending appropriate measures to address abuses involving such practices, but the CAC can also assist the Commission – and states – in crafting consumer outreach and education programs.

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[59] USTelecom Comments at 11.

[60] NASUCA Comments at 18-19.

NASUCA recommends that the Commission include this task in charging the CAC in connection with these proceedings.

II. REPLY TO PARTICULAR PARTIES' COMMENTS OR ISSUES

A. VERIZON'S COMMENTS CONFIRM THE NEED FOR LONGER RISK-FREE TRIAL PERIODS THAN CURRENTLY PROVIDED BY INDUSTRY.

In its initial comments, NASUCA noted that one of the critical concerns with providers' billing practices and disclosures was the fact that, regardless of matters disclosed in the fine print of marketing materials or service contracts, many consumers do not know precisely what services they have signed up for or what charges they are obligated to pay, until they receive their first – and sometimes second – bill.[61] This was the basis for an alternate proposal suggested by NASUCA that could, potentially, obviate the need for developing many additional rules intended to cover a cacophony of carrier marketing and sales pitches, provided over a multitude of different media, regarding a vast array of service offerings – individual or bundled. NASUCA suggested that one alternative to crafting rules to address such communications might be to simply mandate that providers of communications services give customers an adequate, risk-free trial service period that commences when the first bill is rendered. In NASUCA's experience – and this experience apparently is shared by the Commission[62] – the first bill or two received from a new carrier or communications provider is among the most critical communications a consumer will receive. It is the one piece of paper (or email attachment) that a consumer is likely to spend considerable time poring over to make sure

[61] *Id*. at 41-42.

[62] *See, e.g.*, *First Truth-in-Billing Order*, 14 F.C.C.R. at 7494-95 ¶3; *Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, CC Docket No. 98-170, 13 F.C.C.R. 18176, 18177-79 ¶¶3-6 (Sept. 17, 1998).

that the consumer is receiving the services he or she thought they had subscribed to, and being charged the amounts for those services that the consumer expected to pay.

One of NASUCA's – and other consumer groups' – long-running criticisms of the wireless industry (and the industry's voluntary Code), is the unduly short trial-free service period offered by the carriers before a consumer is locked into a long service contract with the prospect of a hefty penalty if the customer is unhappy with the disconnect between service and cost expectations and reality. As the Code makes clear, wireless carriers are expected to offer a risk-free, trial service period of from 15 to 30 days after service activation. NASUCA and others have pointed out, in numerous comments – both in this proceeding and elsewhere – that this is far too short. In order to be meaningful, NASUCA has argued, a risk-free, trial service period must be sufficiently long to allow a consumer to thoroughly review his or her bill and try the carrier's service – and this period cannot commence until the first bill is rendered. Accordingly, NASUCA urged the Commission to consider adopting a 60-90 day risk-free trial period for all communications consumers.

Proposals for longer risk-free trial periods have typically met with opposition from the wireless industry, so the Commission might understand NASUCA's pleasure in finding confirmation for its proposal in Verizon's comments. In its comments, Verizon discussed its recent program of providing information about estimated charges certain wireline customers are likely to see on their first bill, and noted:

> Verizon began orally providing the First Bill Estimate in its call centers and sending this confirmation letter to new FiOS customers in June 2009 in response to customer feedback. As a result of this effort, Verizon has experienced a significant reduction in customer calls with questions about the first bill. *The percentage of customers that called to inquire about their bills within the first 31-45 days of service (i.e., the time period when*

> *the first bill is most likely to arrive*) fell by over 50% the month after the First Bill Estimate was put into place.[63]

Verizon, perhaps inadvertently, confirms NASUCA's point. More importantly, Verizon's comments suggest that it receives a fairly high volume of inquiries from customers regarding their first bill but only a month or more after service was initiated.

B. THE ITTA MAKES GOOD POINTS REGARDING THE NEED TO EXTEND TRUTH-IN-BILLING AND RELATED REGULATIONS TO VOIP SERVICE.

Like NASUCA, the Independent Telephone and Telecommunications Association ("ITTA") supports extension of the Commission's existing truth-in-billing regulations to all VoIP providers.[64] Both NASUCA and ITTA agree that, in the interest of regulatory parity, providers that offer voice service to consumers, regardless of the underlying technology utilized to provision that service, should be subject to the same truth-in-billing as other providers of voice service and that the Commission should not distinguish between providers of VoIP services and providers of interconnected VoIP services.[65] ITTA makes some good points regarding the Commission's analysis of interconnected VoIP under other regulatory programs (*i.e.*, CALEA, E911) and its conclusion that, for purposes of those programs, VoIP should be considered a telecommunications service.[66] NASUCA would add the Commission's inclusion of VoIP as a payor into the federal Universal Service Fund as further support for extending truth-in-billing and any other regulations that the Commission may adopt in these proceedings to VoIP providers. Finally, NASUCA urges the Commission to make it clear that states may similarly

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[63] Verizon Comments at 36.

[64] ITTA Comments, p. 2.

[65] *Id.* at 9.

[66] ITTA Comments at 9-10.

regulate VoIP providers – at least providers of fixed (as opposed to nomadic) VoIP and other IP-enabled services, consistent with the Eighth Circuit's ruling in *Vonage Holding*.[67]

C. CTIA'S COMMENTS CONFIRM NASUCA'S CRITIQUE OF ITS WIRELESS CONSUMER CODE'S EFFICACY.

In its initial comments, NASUCA pointed out the many deficiencies in CTIA's Wireless Consumer Code that warrant the Commission's rejection of relying upon it or similar voluntary industry codes as an adequate means of protecting consumers of communications services from unreasonable, fraudulent, misleading billing and service disclosure-related practices that exist in the communications industry.[68] In several respects, the comments submitted by the Code's author and chief supporter – CTIA – actually lend credence to NASUCA's criticisms.

For example, with respect to the Code, CTIA proclaims that: "The Consumer Code *remains a zero-cost*, highly effective method of *creating stringent but evolving norms* within the wireless industry that benefit consumers and avoid the delay and associated administrative costs of federal governmental intervention."[69]

CTIA's reference to "zero cost" is telling. The Code is "zero cost" to the wireless industry because it makes absolutely no provision for independent investigation and confirmation of carriers' claims that they comply with the Code's principles. The Code is "zero cost" to the wireless industry because it makes absolutely no provision for independent investigation of complaints regarding non-complying acts, omissions or

[67] *See Vonage Holdings v. Nebraska Public Serv. Comm'n*, 564 F.3d 900 (8th Cir. 2009).

[68] NASUCA Comments at 33-38.

[69] CTIA Comments at 20 (emphasis added).

practices of signatory carriers that are lodged with CTIA. The Code is "zero cost" to the wireless industry because it contains absolutely no mechanism for enforcing compliance with the principles contained in it. And the Code is "zero cost" to the wireless industry since there is no provision made for making available to wireless consumers information regarding complaints involving wireless carriers regarding their compliance with the Code, or investigations related to such complaints, or any enforcement action taken against carriers whose practices or disclosures violate the Code's principles. Such a hollow instrument is no model for adequate protection of consumers in the wireless communications market, nor is it suitable for use as a model for any other communications market.

Likewise, CTIA's claim that the Code is an "evolving set of norms" does not square with reality. As the industry trade association notes, the Code was created in 2003 (not by coincidence, the Code was developed and announced while 33 states' attorneys general were in the midst of law enforcement investigations into the practices of three of the nation's largest carriers). The Code has not been modified or amended in any way since 2003, suggesting it is hardly the dynamic, evolving set of norms CTIA claims. Rather it is a static bit of window dressing that the industry cites to justify inaction by government in response to unreasonable wireless industry practices, such as fixed ETFs or unilateral changes without notice to terms and conditions of service, or arbitrary extensions of service for minor changes in service requested by customers, to name a few.

It is worth noting further that CTIA touts reductions in wireless consumer complaints lodged with the Commission recently as signs that the Code works.[70] This claim is inconsistent with both CTIA's comments elsewhere, and with the Commission's own complaint data. As CTIA notes, the Code was adopted some six years ago – yet the purported decline in consumer complaints to the Commission CTIA cites has occurred (if it really has occurred at all) only in the last year or so, apparently in response to a number of changes carriers have made in response to government intervention or threatened intervention, such as prorating ETFs, providing service without requiring a fixed term of service, etc. Prior to these changes in carrier practices – none of which were required by the Code and all of which were compelled by government intervention – wireless complaints lodged with the Commission remained steady or even increased, according to the CGB's quarterly reports. Thus, it is clear that the wireless industry's development and marketing of the Code as a consumer protection device was a miserable failure.

The Code, as NASUCA has noted both here and in its initial comments, is not suitable as a model for protecting consumers – though it probably would serve very well as a model for protecting industry from those consumers. That is hardly the end sought by the Commission in the *NOI*, however.

D. CTIA Ignores The Misleading Character Of Carriers' Fees And Surcharges By Noting They Advise Consumers That Such Charges Are Not Government Taxes.

In its comments, CTIA claims to support "the Commission's efforts to require the straightforward disclosure of government-mandated and non-mandated charges on customers' bills," because this "ensur[es] that [customers] understand the fees their

[70] CTIA Comments at 17-19.

government assesses, and that they can accurately compare fees carriers may voluntarily impose."[71] CTIA suggests its Code promotes those efforts because it "already requires carriers to separate taxes and other government-mandated charges that are collected from customers and remitted to the government from charges that are not remitted to the government," requires carriers to "distinguish 'fees and other charges collected by the carrier and remitted to federal state or local governments' from other service charges, and signatories "pledge not to label cost recovery fees or charges as taxes."[72] The problem with CTIA's claims – and its Code – is the same problem that NASUCA originally noted in its 2004 truth-in-billing petition, which it and other parties have noted time and again since, namely the confusing and contradictory information carriers provide to consumers in bills and marketing materials.

Carriers almost invariably include the word "regulatory" in their line item surcharges and fees.[73] "Regulatory" refers to "regulation," and as every American knows, there is only real source of regulation – the Government. Unless consumers dig through the fine print in carriers' bills or marketing materials, they are unlikely to see carriers' disclaimers advising that their "regulatory" surcharges and fees are not "taxes," or otherwise "mandated" or "required" by the government. Consumers who do not read the fine print (and it oftentimes is quite fine indeed) reasonably assume that the charge

[71] CTIA Comments at 29.

[72] *Id.*

[73] Thus, for example, T-Mobile imposes a "Regulatory" Program Fee. *See* CPUC Comments, Appendix. AT&T charges its customers either a "Regulatory" Cost Recovery Charge of up to $1.25 or a "Regulatory" Programs Charge of $1.75 to help defray costs incurred to comply with State and Federal telecommunications regulations, such as E911 deployment, State and Federal Universal Service, and other government mandates (see attached copy of wireless service agreement summary and explanation of additional charges from AT&T's website). Sprint Nextel adds a "Regulatory" Charge to its customers' bills (see attached copy of materials printed from Sprint's website). US Cellular charges its customers a "Regulatory" Cost Recovery Fee (see attached copy of US Cellular website's explanation of National 450 Plan features).

has its origin with the Government. Those consumers who do read the fine print are reasonably likely to be sorely confused over just what the charge is – it's not a "tax" or "government-mandated," yet it's a "regulatory" charge. Many of these consumers are likely to assume that the Government had something to do with the charge, and this assumption is buttressed by the carriers' descriptions of the charges as recovering costs of complying with various Government programs.

In short, "regulatory" line items are at best confusing and contradictory; at worst such line item charges are misleading and distort price signals consumers receive from carriers. Segregating government-mandated taxes and fees into a separate section of the carrier's bill is certainly a step in the right direction. Yet NASUCA cannot help believing that charges carriers impose at their discretion, for example to recover their costs of complying with the law (which is, after all, an ordinary cost of doing business), should be clearly characterized as originating with the carrier and should in no way suggest that the Government requires, or even expressly allows, such charges. The Commission should use the opportunity afforded by the *NOI* to go back and revisit its 2005 decision giving carriers a "blank check" to impose such fees.

E. THE APPROPRIATENESS OF A "SCHUMER BOX" IS NOT CONTRADICTED BY INDUSTRY'S COMMENTS.

NASUCA supported, in its initial comments,[74] the Commission's adoption of a "Schumer Box" to assist consumers in understanding and comparing the critical rates, charges and features of communications services they are considering purchasing. While some industry questioned the appropriateness of such a requirement, their comments either do not militate against adopting a "Schumer Box" or actually support its utility.

[74] NASUCA Comments at 33; *see also* CUB Comments at 3-4.

CTIA, for example, claims that a "Schumer Box" for broadband services would be inappropriate because "wireless broadband is substantially different than wired broadband," which makes difficult an "apples-to-apples comparison between wired and wireless broadband products."[75] CTIA appears to miss the boat on this point. The purpose of requiring a "Schumer Box" or similar disclosure is not merely to allow consumers to make apples-to-apples comparisons between wireless and wireline broadband products, but to enable them to understand what kind of apple they're getting from a provider: what is the service the consumer is going to get, how well will the service work, how much will the service cost, etc.

Moreover, CTIA's comments appear to concede that a "Schumer Box" would, at least, allow an apples-to-apples comparison of different providers' wireless broadband offerings (and by extension, permit the same sort of comparison between wired broadband products offered by different providers). This is certainly a benefit of such a requirement. Finally, with respect to CTIA's concern that consumers will not realize the "unique attributes of mobility" in attempting to compare wired vs. wireless transmission speeds, NASUCA is fairly confident that consumers sophisticated enough to subscribe to broadband are sophisticated enough to realize that wireless broadband may give them lower transmission speeds but the freedom to take their broadband with them – in other words, to weigh the pros and cons of the two products and make a rational choice between them.

Sprint's comments, or rather the exhibits attached to those comments, similarly support adoption of a "Schumer Box" or similar disclosure. Sprint's Exhibit A, which is a magazine advertisement, manages to convey most of the critical information that would

[75] CTIA Comments at 4.

be expected in a "Schumer Box," without requiring the consumer to wade through several pages or paragraphs of fine print to find all the rates, charges and other terms and conditions of service.[76] Sprint's "service plan guide" in its Exhibit B, on the other hand, stands in stark contrast to the carrier's advertisement set forth on Exhibit A, and highlights the value of a "Schumer Box." Every price quoted by Sprint in its "service plan guide" is marked by a double asterisk and the ubiquitous comment, "[s]ee page 26 for important details."[77] Moreover. a note under Sprint's double asterisk excludes taxes and various Sprint surcharges. The page 26 referred to by Sprint provides, in fine detail, critical terms of service such as Sprint's ETF, service activation charge, reconnection fees, service deposits, text messaging charges, etc. Twenty-six pages is a lot of material to wade through to get to this information which ought to be set off in a box, prominently bordered, at the beginning of any marketing or sales material.

F. NASUCA AGREES WITH MANY OF STIPREPAID'S COMMENTS.

NASUCA agrees with STi Prepaid, LLC's ("STi") recommendation that any rules the Commission adopts, or previously adopted rules that the Commission extends to new services or providers, should be applied to wireless prepaid services.[78] Such action is warranted in the interests of both regulatory parity and consumer protection. In addition, such action is made even more appropriate in light of the fact that wireless prepaid providers (*e.g.*, TracFone) are seeking and obtaining designation as eligible telecommunications carriers ("ETCs") under 47 U.S.C. §214(e), entitling them to receive

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[76] Sprint Comments, Exhibit A.

[77] *Id.*, Exhibit B.

[78] STi Comments, p. 3.

operating support and obligating them to provide services akin to those originally offered by incumbent local exchange carriers.[79] In such circumstances, applying disparate truth-in-billing and service disclosure rules for prepaid versus. postpaid wireless services is particularly inappropriate.

NASUCA also agrees with STi that voluntary codes such as CTIA's Code are not appropriate for the prepaid wireless service sector.[80] The different characteristics of this market sector, as with many other types of communications services being considered by the Commission in these proceedings, is yet another reason why voluntary industry codes are not appropriate tools for protecting consumers against unreasonable practices in the industry.

Finally, NASUCA concurs with STi's suggestion that the Commission needs to extend its 2000 Joint Advertising Policy to prepaid wireless services.[81] NASUCA likewise recommended that the Commission consider and incorporate principles and rationales expressed in that policy statement in fashioning and extending truth-in-billing and service disclosure rules.[82] Extending the 2000 policy statement to prepaid wireless service makes eminently good sense. Moreover, to the extent STi suggests that 47 U.S.C. §201(b) provides the Commission with adequate authority to fashion service disclosure rules, in contradiction to Verizon's argument otherwise,[83] NASUCA is in accord.

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[79] *See, e.g., Federal-State Joint Board on Universal Service, TracFone Wireless, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the State of New York et al.*, Order, CC Docket No. 96-45, 23 F.C.C.R. 6206 (April 11, 2008) .

[80] STi Comments at 10 n. 32.

[81] *Id.* at 10-11.

[82] NASUCA Comments at 29 & 32.

[83] Verizon Comments at 50.

G. DIRECTV'S CUSTOMER SATISFACTION ASSERTIONS DO NOT SQUARE WITH CONSUMER COMPLAINTS AND ITS MARKETING MATERIALS SUPPORT EXTENDING TRUTH-IN-BILLING AND SERVICE DISCLOSURE RULES TO THE SATELLITE INDUSTRY.

DirecTV notes in its comments that it has been "top-ranked in customer satisfaction as compared to the largest national cable and satellite providers by the American Customer Satisfaction Index" over the past nine years, has "one of the lowest levels of customer churn in the industry," and "[i]n short, based on all of the available data, [its] customers are happy with their service."[84] NASUCA is skeptical of DirecTV's claims. For one thing, NASUCA notes that DirecTV imposes a fairly stiff ETF (called an early cancellation fee by DirecTV) on customers, and further notes that DirecTV serves many customers via a bundled service arrangement with Verizon. As the Commission knows, ETFs in the wireless industry have been very effective in reducing customer churn[85] and there is no reason to expect that they would be less effective in the satellite broadcast services market. There is likewise no reason to expect that customers in this market would be any happier with ETFs than wireless customers.

As for DirecTV's claims of customer satisfaction, NASUCA has not had an opportunity to closely review the surveys and reports DirecTV cites in its comments. However, a Google search using "DirecTV" and "early cancellation fee" led to numerous websites on which DirecTV customers complained not only about the provider's ETFs but other practices relating to billing and service-disclosure practices. One of the websites contained at least 80 pages of complaints, each containing several complaints,

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[84] DirecTV Comments, p. 2.

[85] *See, e.g.*, Edward Mierzwinski, "Locked in a Cell: How Cell Phone Early Termination Fees Hurt Consumers," MASSPIRG Education Fund Report (August 2005); available at http://www.masspirg.org/uploads/DK/Ji/DKJih9bWf5ElRF9_MDigzQ/_Locked_In_A_Cell_.pdf.

going back no further than 2006.[86] In addition, NASUCA notes that DirecTV's ETFs, marketing and sales practices are the subject of numerous class action lawsuits that have been consolidated in the U.S. District Court for the Western District of Washington.[87] Such matters are generally not indicative of a high level of customer satisfaction and should be considered accordingly.

H. THE STANDARD FOR ADOPTING ADDITIONAL TRUTH-IN-BILLING OR SERVICE DISCLOSURE RULES ADVOCATED BY CTIA IS INSUPPORTABLY HEAVY.

In its comments, CTIA asserts that the Commission must conclude there is evidence of "market failure" before it can adopt rules restricting commercial speech.[88] The heavy burden CTIA would impose on the Commission to justify adopting additional truth-in-billing rules or service disclosure rules is simply not supported by the law.[89] As Verizon notes, all that is required is a "substantial state interest" and that its regulations either "reasonably fit" or are "narrowly tailored" to serve that interest.[90] Even CTIA recognizes, earlier in its comments, that the Commission merely must show that the

[86] *See, e.g.*, http://www.consumeraffairs.com/cable_tv/directv_bill.html *and* http://www.complaintsboard.com/complaints/directv-c43172.html.

[87] *See* Hearing Session Order, *In re: DirecTV, Inc. Early Cancellation Fee Marketing and Sales Practices Litigation*, MDL No. 2093 (Aug. 14, 2009, United States Judicial Panel on Multidistrict Litigation), available at www.jpml.uscourts.gov/Hearing_Info/HearingOrder9-24-09.pdf.

[88] CTIA Comments at 56.

[89] There is simply insufficient space or time here to provide a full analysis of the law regarding government regulation of commercial speech. However, NASUCA may address the First Amendment arguments of the industry in comments to any subsequently issued notice of proposed rulemaking or in *ex parte* presentations to the Commission in these proceedings.

[90] *See* Verizon Comments at 59-60.

"harms it recites are real" and that its rules will actually "alleviate them to a material degree."[91] This test hardly requires evidence of "market failure."

Likewise, CTIA claims that Congress and the Commission have "repeatedly identified a substantial government interest in keeping wireless services *unregulated*."[92] This assertion is patently false. When Congress amended Section 332(c)(3)(A) of the Communications Act in 1993 to preempt states from regulating the "rates charged by" and "entry of" wireless carriers, and to permit the Commission to forbear from applying common carrier regulations to such carriers, it expressly preserved broad state authority to regulate "other terms and conditions" of wireless service, particularly state consumer protection laws. This was made clear in the 1993 amendments' legislative history, which stated:

> It is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. *By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis *or such other matters as fall within a states lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."* [93]

Similarly, the Commission retains full authority to adopt consumer protection regulations that apply to the wireless industry. Nowhere is the Commission (or states) obligated to leave wireless unregulated.

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[91] CTIA Comments at 56.

[92] *Id.* (emphasis original).

[93] H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

III. CONCLUSION

For all the foregoing reasons, the Commission should incorporate NASUCA's comments and recommendations set forth both herein and in its October 13, 2009 comments in any future decisions or actions in this proceeding.

Respectfully submitted,

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